Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

RICHARD K. PASHUCK,

Petitioner,

vs.

JOHN B. COOKSEY, Sheriff, County of Salem, NJ; THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does not a prosecution team's falsification/suppression of information, when that information is relevant and material to the trial and appellate court's ruling denying disclosure of the identity of an informant for use in an entrapment defense, constitute a per se violation of *Brady v. Maryland*, 373 U.S. 83 (1963) since a different result as to disclosure would have been reasonably probable under *Kyles v. Whitley*, __ U.S. __, 115 S. Ct. 1532 (1995), given recitation to and reliance by the trial and appellate court on the misrepresented facts presented by that prosecution team at the pre-trial motion?

2. Given that *Roviaro v. United States*, 353 U.S. 53 (1957), as a matter of due process, requires trial courts to compel timely pre-trial prosecutorial disclosure of an informant's identity when such identity is relevant or helpful to the defense and given that *Brady v. Maryland*, 373 U.S. 83 (1963), as a matter of due process, later attempted to remedy prosecutorial failure to provide pre-trial disclosure of material, favorable evidence, should not minimal due process pre-trial implementation of *Roviaro* require, at the least, in the context of *Brady* and an entrapment defense, prosecutorial disclosure to and thereafter *in camera* review by the court so that trial and appellate courts have a judicially created record by which to assess whether disclosure was warranted rather than being relegated to relying on the informant characterization (*e.g.* "mere tipster", "reliable informant") proffered by law enforcement and/or prosecuting authorities?

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Petitioner Richard K. Pashuck respectfully petitions for a Writ of Certiorari to review the decision of the Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Judgment Order of the United States Court of Appeals for the Third Circuit affirming the District Court is attached at Appendix A. The opinion of the United States District Court is not reported and is attached at Appendix D. The Order and Opinion of the United States Court of Appeals for the Third Circuit granting a Certificate of Appealability is attached at Appendix B. The Judgment Order of the United States Court of Appeals for the Third Circuit denying appellant's timely Petition for Rehearing is attached at Appendix H.

STATEMENT OF JURISDICTION

The Judgment Order of the Court of Appeals for the Third Circuit affirming the District Court was entered on December 18, 1997. The Order of the Court of Appeals for the Third Circuit denying the timely Petition for Rehearing was entered on January 15, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the United States Constitution, Amendment XIV, Section 1, which reads:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

While Petitioner was incarcerated at the Salem County Jail, Petition for *Habeas Corpus* relief pursuant to 28 U.S.C. § 2254 was filed on his behalf on April 12, 1996 in the District of New Jersey, *Pashuck v. Cooksey, et al.*, Docket No. 96-1799 (JBS). Petitioner's then counsel requested an evidentiary hearing and while apparently not specifically denied, the District Judge effectively did so by way of his August 27, 1996 opinion denying petitioner's application for a writ of *Habeas Corpus* and ordering that no certificate of probable cause shall issue, at Appendix D. Petitioner filed a Notice of Appeal with the Third Circuit Court of Appeals on September 26, 1996 and Certificate of Appealability was granted by that Court in its June 26, 1997 Order, at Appendix B.

Petitioner-Appellant Richard Pashuck was convicted in the New Jersey State courts of sale of two $50 bags of cocaine to an undercover police officer for $90. Petitioner raised the affirmative defense of entrapment under N.J.S.A. 2C:2-12 and the trial judge submitted that issue to the jury on May 19, 1994. On September 10, 1993 at a pre-trial hearing, the prosecutor objected to questions concerning the informant's working relationship with the prosecutor's office, 9/10/93 T22-10 to 24-9 and 25-4 to 25, resulting in the trial judge's response that:

> THE COURT: Well, you can do that by — you know, I'll give you an order, if you want it, for the prosecutor's office to indicate to you whether or not he's been involved as a confidential informant in the past.
>
> MR. ZEHNER: Well, that's part of what we want, your Honor. But we also want to know who he is and all the entire arrangements.

9/10/93 T25-19 to 24.

The trial judge in his oral opinion of September 30, 1993 relied upon, among other things, the fact that the informant (Miami Eddie) was neither paid nor regularly employed by the State in refusing to Order the State to disclose Miami Eddie's true identity, 9/30/93 T2-22 to 9-3, more particularly T6-20 to 7-4 and T7-15 to 20, Pa33 to 37. Petitioner's counsel sought and was granted interlocutory review of that trial ruling and the New Jersey Superior Court Appellate Division, in affirming, noted detective Spinelli's testimony that Miami Eddie was not a paid informant and had never been employed, to Spinelli's knowledge, in an informer capacity by the Salem County Prosecutor's Office, *State v. Pashuck*, March 22, 1994 Appellate Division opinion at p.3, at Appendix E.

Thereafter, Petitioner's defense counsel filed another Motion for discovery as to Miami Eddie. The day before trial, May 16, 1994, prosecutor Sloan advised the Court and defense counsel at that point that there had been a gun charge pending against Miami Eddie, that he agreed to involve himself in undercover investigations to receive some consideration on the gun charge, was compensated for his room and board and, as later developed through Lt. Miller's testimony at that hearing, worked on a number of jobs or investigations for that office, 5/16/94 T3-7 to 5-1 and T7-12 to 16-23 and, T25-2 to 10, at Pa146 to 148, 150 to 159, 168.

A copy of the indictment against Miami Eddie and the March 2, 1993 Order dismissing that indictment was, in effect, reviewed at an *in camera* hearing by the trial judge on the first day of trial, *see* May 17, 1994 (Volume B) transcript T23-21 to 26-20, Pa203 to 206, with the trial judge marking the indictment and the Order respectively, as exhibits C-1 and C-2. The exact "deal" between Miami Eddie and the Salem County Prosecutor's Office was never specifically set forth; no redacted "rap" sheet was provided and information as to the other 4 investigations conducted by Miami Eddie likewise was not provided.

Miami Eddie did not testify at trial. The majority of information which defense counsel obtained as to Miami Eddie was only provided on May 16 and 17, 1994, the day before and the day that trial commenced. At trial, Petitioner Pashuck testified concerning his entrapment, *see* 5/18/94 T84-3 to 148-22, Pa338. He first met Miami Eddie at the Woodstown Hotel Bar at approximately 4:30 p.m. on March 15, 1993, 5/18/94 T96-23 to 97-4. He had never met Miami Eddie before and was very impressed with "someone who claimed to be a professional pool trick shot exhibitionist", T98-1 to 13. While petitioner only regularly drinks beer (Coors Light), that day Miami Eddie offered to buy him a drink and since Miami Eddie was drinking Dewar's scotch, Petitioner allowed him to buy shots of Seagrams Gin, explaining that he "wanted to drink something that was comparable to what Miami Eddie was drinking at the time", T101-18 to 102-13. During the course of the next 2 hours, Miami Eddie bought him additional drinks, a total of four shots of that liquor, T120-2 to 8, T147-25 to 148-11. Several of petitioner's friends/acquaintances testified on his behalf, indicating that Richard appeared to be intoxicated, noting that Miami Eddie bought drinks only for the petitioner, *see, e.g.,* 5/17/94 T92-23 to 95-8 and, T97-12 to 98-11 (witness Crawford) and T113-6 to 114-3 (witness West).

Petitioner explained that Miami Eddie initiated any discussion of drugs, asking him for a "bump" and upon petitioner's puzzled query, Miami Eddie indicated snorting with his finger closing one nostril, telling Petitioner that he wanted some coke so as to allow him to drive to Florida, T114-21 to T122-12. Petitioner initially resisted becoming involved, doing so on 4 occasions but finally telling Miami Eddie "that there was an individual there [at the bar] that might be able to assist him in his desire to obtain this coke", Miami Eddie requesting Petitioner to "please find out for me", T118-7 to 14. Petitioner made the inquiry and received two $50 packets of cocaine (in a

matchbook) from Darryl Shorter and returned with those packets. Miami Eddie advised that he had to call his brother-in-law and deferred accepting the packets from Petitioner. Petitioner then returned the cocaine to Shorter and was questioned by Miami Eddie as to whether Petitioner "had gotten the coke from the black guy down at the end of the bar". When Petitioner responded affirmatively, Miami Eddie advised Petitioner that he didn't "like dealing with blacks", 5/18/94 T147-19 to 24.

Additional testimony by the State at the time of trial established that Miami Eddie had contacted his control officer Lt. Miller via beeper at approximately 4:30 p.m. on the evening of March 15, 1993, 5/17/94 T3-15 to 8-16, Pa180. Lt. Miller, based on his conversation with Miami Eddie, advised him that he was tied up and that the Narcotics Task Force Team "would be responding in approximately two hours to his location", eventually meeting him near the Woodstown Bar at 6:30 p.m., 5/17/94 T11-2 to 12-6. The "brother-in-law" story was then devised and investigator Spinelli drove Miami Eddie's vehicle to the rear lot of the Woodstown Hotel. Approximately 10 minutes later, Petitioner, after again obtaining the packets of cocaine from Darryl Shorter in the bar, went outside with Miami Eddie to his car, a green Grand Prix with Alabama tags, 5/18/94 T121-12 to 125-11. Petitioner explained that when they were all in the car that Miami Eddie and his brother-in-law pooled their money and Petitioner handed the matchbook with the two packets of cocaine to Miami Eddie, *ibid.*

At the time of the September 10, 1993 pre-trial hearing on the defense Motion for disclosure of the identity of the informant, only Investigator Spinelli was produced by the State to testify. Investigator Spinelli testified that he was not aware of any involvement of Miami Eddie with law enforcement agencies other than the Salem County Prosecutor's Office and objection was successfully lodged as to inquiry of Spinelli's knowledge

of Miami Eddie's working arrangement with the Prosecutor's Task Force, 9/10/93 T22-10 to 24-9, Pa22 to 24. Objection likewise was successfully lodged as to the query whether there could have been arrangements between this confidential informant and the Prosecutor's Office of which Spinelli was not aware, 9/10/93 T24-4 to 13. The trial judge responded that he would provide an Order that the Prosecutor's Office should disclose whether Miami Eddie had been involved as a confidential informant in the past and defense counsel requested that as "part of what we want", 9/10/93 T25-19 to 25. The trial judge, in his September 30, 1993 oral decision denied disclosure of the identity of Miami Eddie, basing that opinion in part on the testimony of Investigator Spinelli that the informant was not a paid informant; had never been employed to that officer's knowledge in an informant capacity; and, according to Spinelli's testimony, was not an agent of the State, 9/30/93 T6-8 to 7-7, Pa34, 35. At the time of the Trial Judge's opinion denying disclosure on September 30, 1993, trial was set for the following Monday, October 4, 1993. 9/30/93 T10-11, Pa38.

Defendant successfully moved on October 1, 1993 for interlocutory appeal, submitting a lengthy appendix which included his Motions and amended Motions in support of the application for disclosure of identity of the confidential informant, at Pa41 to 137. After oral argument before the New Jersey Superior Court, Appellate Division, that appellate court, in its March 22, 1994 opinion, affirmed the trial judge's ruling denying disclosure, citing among other things Investigator Spinelli's testimony that Miami Eddie was not a "paid informant" and that Miami Eddie had never been employed to Spinelli's knowledge as an informant by the Prosecutor's office, characterizing the telephone call from Miami Eddie as a "tip", at Pa138. The Appellate Division stated as a general rule that:

> Disclosure of an informant's identity is also warranted where the informant is an active participant in the crime. *State v. Milligan, supra*, 71 N.J. at 385 - 87.

March 22, 1994 Opinion at p. 5, at Appendix G.

The same Prosecutor was involved from the time of the September 10, 1993 *Roviaro* disclosure hearing, through trial and up to sentencing on June 22, 1994. She did not apprise the Appellate Division at or before the time of its March 22, 1994 decision affirming the trial judge that Miami Eddie was in fact a compensated informant for the Salem County Narcotics Task Force; that his involvement arose by way of his offer to do investigations in order to obtain leniency as to a gun charge; that he had participated in four other investigations, apparently leading to arrests in three of those investigations and that the investigation of this Petitioner was something initiated entirely by Miami Eddie.

All that information was not disclosed by the Prosecution team until the day before trial, May 16, 1994 and then only by virtue of defense counsel's Motion for additional information as to the confidential informant at a *N.J.R.E.* 104 Hearing. The day before trial, Prosecutor Sloan, for the first time, disclosed that Miami Eddie had been picked up in Carney's Point on a gun charge; that he indicated that he was willing to cooperate in any fashion to receive consideration on that charge and that he was involved in specific cases for some period of time for which he received no compensation but did receive room and board, 5/16/94 T3-7, at Pa146.

Lt. Miller testified at the May 16, 1994 Rule 104 hearing that Miami Eddie was his responsibility and that he worked out an arrangement with him in November or early December of 1992. He became aware of Miami Eddie by virtue of a telephone call from a Carney's Point Police Officer as well as from a D.E.A. Agent advising Lt. Miller that Miami Eddie had done work for them in Miami and Georgia and that as to the "particular weights" involved, that the Salem County Prosecutor's "office was quite interested", Pa151 to 153.

As to the details of March 15, 1993, Lt. Miller testified that he received a call from Miami Eddie and in response to that gave instructions to Miami Eddie that the Task Force would be tied up for approximately 2 hours and would meet with him at that time, 5/16/94 T22-2 to 24, at Pa165. As the control officer for Miami Eddie, Lt. Miller did not arrange for him to go to the Woodstown Hotel Bar on March 15 and did not know why Miami Eddie went to that establishment, 5/16/94 T23-9 to 24-3, at Pa166, 167.

There were five investigations in which Miami Eddie had been involved, working 2 to 3 nights out of the week and doing so for 2 to 3 hour periods, 5/16/94 T25-2 to 18, Pa168.

The day after the Rule 104 Hearing and just before start of testimony at the trial, the Prosecutor advised that Miami Eddie had entered a plea of guilty to the gun charge on March 2, 1993. Defense counsel requested copy of the indictment and the plea along with Judgment of Conviction, requesting same in at least redacted form with response by the court that it might take judicial notice of those documents, 5/17/94 T5-9 to 6-19, Pa212, 213.

After opening arguments, it was then disclosed, by way of review of the indictment by the court that Miami Eddie had been indicted for unlawful possession of a weapon and that that indictment had been dismissed on Motion of the Prosecutor by Order of the same judge on March 2, 1993, *see* 5/17/94 (Volume B) T24-7 to 25 and Exhibits C-1, C-2 marked by the Court and not disclosed to defense counsel, at Pa204 to 206.

That same day Lt./Sgt. Charles Miller testified before the jury as well. Among other things, he disclosed that there had been "four actual arrests" and a total of five investigations, 5/17/94 T8-22 to 9-25. As to whether Miami Eddie was "still

working" for the Prosecutor's Office on March 15, 1993 Lt. Miller's response was "not particularly" and he also disclosed that Miami Eddie was preparing to leave that evening, 5/17/94 to T10-1 to 7.

The Prosecutor's Office had dismissed the gun charge almost 2 weeks earlier on March 2, 1993. Miami Eddie had been down in Atlantic City for a pool tournament the weekend of March 13, 14. Sgt. Miller also disclosed that he and his undercover officers had been engaged in a different surveillance in the City of Salem and were delayed in responding for approximately 2 hours to the Woodstown Hotel, 5/17/94 T11-2 to 14. He advised Miami Eddie that there would be an approximate 2 hour delay. On cross examination, he confirmed that of the five investigations, four of them resulted in arrests, 5/17/94, T27-7 to 19.

As to whether Miami Eddie utilized the same investigatory procedures with Petitioner Pashuck as he did on the previous four investigations, Lt. Miller responded "to some degree sir" indicating that the Prosecutor's Office did not initiate the investigation on Pashuck and that Miami Eddie was considered to be on his own free time when he initiated this particular investigation, thereafter leaving the area at about 10:30 that evening, 5/17/94 T28-7 to 29-3. Lt. Miller only admitted that Miami Eddie followed basic guidelines as far as contacting his control officer "and stuff", 5/17/94 T29-4 to 10. He acknowledged that he was not aware of Miami Eddie utilizing his business card in any of the other investigations, Ibid. Inv. Spinelli also testified at the trial that day and it was then disclosed that he was only "on loan" with the Prosecutor's Office as of March 15, 1993, 5/17/94 T37-15 to 38-9.

Defense counsel presented testimony from the owner of the news agency across the street from the bar (who knew the

defendant for 10 years), that when he came in to buy cigarettes that day he was "very excited", was enthusiastically discussing his new friend Miami Eddie who was showing him pool tricks, and that he only stayed at the agency for about a minute which the owner found unusual. In his opinion Petitioner was intoxicated and seemed to have been "drinking more than usual", 5/17/94 T108-1 to 114-3. Upon inquiry from the Court, defense counsel advised that the evidence of intoxication was relevant to the entrapment defense by way of lowering the Petitioner's resistance, 5/17/94 T115-22 to 116-5.

James Crawford and Arthur Minter were present in the bar for some period of time while Petitioner and Miami Eddie were there. Crawford, a member of a pool league, went in the bar about 5:00 - 5:15 that day to practice pool and observed defendant and Miami Eddie together most of the time, 5/17/94 T94-4 to 19. He observed Miami Eddie buying drinks for Petitioner but not anyone else, 5/17/94 T94-22 to 95-8. He likewise felt that Petitioner was intoxicated, seeing Miami Eddie buy at least two drinks for Petitioner, 5/17/94 T97-9 to 98-11 and T103-24 to 104-3.

Arthur Minter was in the Woodstown Bar before Petitioner or Miami Eddie arrived, going there to drink a few beers and shoot pool. He knew the defendant and had seen him there playing pool previously and knew that the defendant wasn't that "good at pool". The Petitioner arrived at about 4:00 and the unusual aspect of that day which he recalled was that Miami Eddie came into the bar, announcing himself as a trick pool shooter who was dressed up and was actually very good at trick pool shots. Miami Eddie tried to show the defendant how to do trick shots.

Petitioner testified that he was impressed with Miami Eddie as well as being "fascinated" by him. He went up and told Miami

Eddie that he was extremely impressed and in return was treated to a drink by Miami Eddie. He ordered something comparable to the Dewars scotch which Miami Eddie was drinking, ordering Seagrams Gin for himself even though he normally drank Coors light beer, 5/17/94 T101-22 to 102-13. Petitioner testified that Miami Eddie brought him three additional drinks, 5/17/94 T106-17 to 19, buying one as a "reward" for him for doing a "very fine job" on the pool trick shot which Miami Eddie taught him to do, 5/17/94 T106-17 to 109-7. He likewise recounted two other instances when Miami Eddie purchased a shot of gin for him, 5/17/94 T112-15 to 114-4 and T120-3 to 8.

Because of the delayed disclosure by the Prosecutor of the true nature of Miami Eddie's informer status until trial, neither the trial court, nor the Appellate Division (having already ruled via interlocutory review) conducted a "hearing on the merits", 28 U.S.C. § 2254(d)(8). And, while this Petitioner's Petition for Certification and Notice of Appeal to the New Jersey Supreme Court raised the issue that the "factual underpinnings of the Appellate Division interlocutory ruling have now been established to be incorrect", Petitioner's Petition for Certification and Notice of Appeal were dismissed, at Appendix E.

The *Brady* violation involved here is that of the false impression created concerning Miami Eddie at the defense motion of September 10, 1993 as well as at the argument before the New Jersey Superior Court Appellate Division resulting in its March 22, 1994 interlocutory decision affirming the trial judge's determination to deny disclosure of the identity of the informant, *see* trial judge's determination at Pa29 to 39 and the Appellate Division's interlocutory determination at Pa138 to 143.

The Appellate Division concluded that, based on Spinelli's testimony, Miami Eddie "was not a paid informant and had never been employed . . . in an informer capacity by [the Prosecutor's]

office" and therefore concluded (erroneously) that the Prosecutor's Office, via Investigator Spinelli, had simply received a "tip" from the bar, at Pa140. It was not until May 16 and 17, 1994, that Lt. Miller, the supervisor and "control officer" for Miami Eddie disclosed that Miami Eddie was an informant, was compensated, had been indicted on a gun charge and had received consideration for that.

Lt. Miller testified at a defense discovery motion on May 16 and 17, 1994, the day before and the day of trial. The state trial court did not review the informant's indictment and order for dismissal at that time. Instead, the Prosecutor informed the trial judge on May 17, 1994 "that Mr. [Miami Eddie] Taylor pled guilty March 2, 1993", Pa184-13. Shortly thereafter at 9:26 a.m., the jury entered the courtroom and opening arguments ensued, Pa186 [Prosecutor Sloan] and Pa194 [defense opening]. The jury was then directed back to the deliberation room at 10:00 a.m., Pa203-20. After Lt. Miller was again sworn and interrogated by the court, it developed that there was not an indictment and plea but rather indictment and March 2, 1993 Order dismissing that indictment, Pa204-9 to 205-8.

Defense counsel thus never knew the true nature of the consideration extended to the informant insofar as having his indictment dismissed until after his opening to the jury.

The truth as to Miami Eddie: that Miami Eddie was compensated, was employed as an informant on 4 or 5 occasions, procured (on his own) a deal as to his gun charge indictment, had previous engagements with the DEA along with his apparent failure to follow guidelines in his supposedly sua sponte surveillance of the occupants of the Woodstown Bar on March 15, 1993, were only disclosed to defense counsel and the trial court on May 16/17, 1994, the day before and the day trial commenced. Miami Eddie, for reasons as yet unexplained, had

his gun charge dismissed by Order of March 2, 1993 but lingered in Salem County almost 2 weeks later, impressing some with his "very flashy manner . . . expensive jewelry" or his "long blonde hair (over the ears) [with] suit pants, a white shirt and tie", at Pa64 and Pa73. He purportedly called his control officer at 4:30 p.m. and then delayed the Petitioner for 2 hours until the narcotics task force could arrive in Woodstown at approximately 6:30 p.m. He accomplished that delay by engaging in trick pool shots as well as treating Petitioner to alcoholic drinks.

Miami Eddie was the only person who was Petitioner's constant companion during this 2 hour hiatus. He, purportedly being the "tipster" who first provided information to the narcotics task force, was the only witness who could verify that Petitioner engaged in no other criminal conduct that evening, more particularly, that Petitioner secured cocaine for no one else at the bar, sold no cocaine, distributed no cocaine, in short, had nothing to do with cocaine except by virtue of Miami Eddie.

Miami Eddie solicited Petitioner to secure cocaine and when he observed Petitioner secure same from a black individual, deferred accepting the cocaine at that point and induced Petitioner to return the cocaine to the black individual but ensured that he would again obtain it because he, the long haired caucasian with the Alabama license tags, didn't like dealing with blacks. Finally, he was the only individual who was present in the bar and the car with Petitioner. Indeed, he induced Petitioner to leave the bar to go to his car.

Only Miami Eddie, the Salem County Prosecutor's Office star informant on 4 earlier investigations, could contradict Lt. Miller's testimony that there was "an individual who was supposedly selling cocaine", *see* Pa610. While that was Lt. Miller's view of the situation (and his testimony), Miami Eddie was the only individual who truly did "view" the situation at the Woodstown Bar and could contradict Lt. Miller.

Finally, because the jury requested to read the defense of entrapment after having originally being charged as to that law and because the jury acquitted petitioner of resisting arrest with the use/threat of physical force/violence, there apparently was predisposition on the part of the jury to believe petitioner.

First, the *Brady* violations include the prosecutor's failure to timely disclose that Miami Eddie had been engaged as an informer previously and had been compensated. The prosecutor failed to disclose this information to defense counsel, to the Motion Judge determining whether or not to Order disclosure of the informant's identity and to the Appellate Division panel which granted interlocutory appeal and affirmed the Motion Judge's decision denying disclosure. That interlocutory determination on appeal by the Appellate Division constituted the "law of the case" and the *Roviaro* disclosure issue could thereafter be raised by defense counsel only by way of Petition for Certification/Notice of Appeal to the New Jersey Supreme Court, compare March 22, 1994 Appellate Division opinion, affirming denial of disclosure of informant's identity (at Pa613 to 618) with that Court's decision on direct appeal after conviction (at Pa607 to 612) and defendant's Notice of Petition/ Notice of Appeal (at Pa643, 644) with argument in the Petition/ Appeal that the "factual underpinnings of the Appellate Division interlocutory ruling have now been established to be incorrect", at Pa640.

While the rule of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963) is generally understood as involving "the discovery, after trial of information which had been known to the prosecution but unknown to the defense", *United States v. Agurs*, 427 U.S. 97 at 103, 96 S. Ct. 2392 at 2397 (1976), the particular *Brady* violation here involved the discovery of information after determination of the pre-trial Motion denying disclosure of the informant's identity had been affirmed on interlocutory appeal.

Given that the "law of the case" foreclosed the defense from raising that issue anew at the time of trial (when the prosecution finally chose to disclose that information), the failure to disclose during the pre-trial stage effectively barred the defense from utilization of that information at trial.

Effective utilization of the Miami Eddie information (that he was a compensated informant and had been involved in four previous investigations) would have been achieved by the defense had the prosecutor's office advised the Motion Judge at the September 10, 1993 *Roviaro* Motion or, the Appellate Division at oral argument on February 10, 1994 when those Courts were considering the propriety of disclosure. The Appellate Division, in affirming the Motion Judge, noted Investigator Spinelli's testimony that Miami Eddie was not a paid informant and had never been employed, to Spinelli's knowledge, in an informer capacity by his office, further characterizing Spinelli's testimony that "he received a 'tip' emanating from a telephone call from the bar, presumably from the CI to the prosecutor's office", noting that the Motion "judge accepted Spinelli's testimony as truthful." at Pa140.

REASONS FOR GRANTING THE WRIT

In assessing a *Brady* violation, analysis is required as to whether the nondisclosed information is favorable and material, *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375 (1985); *Kyles v. Whitley*, __ U.S. __, 115 S. Ct. 1555 at 1565 (1995). Miami Eddie's involvement as a confidential informant in the past, including not just his compensation and involvement in four other investigations, but also the genesis for his informant involvement, to wit, his arrest on a gun charge while traveling through Salem County, New Jersey are facts which were favorable to the defense Motion seeking disclosure of that informant's identity as well as being material to such judicial

determination of disclosure. As noted above, both the Motion Judge and the Appellate Division credited Spinelli's false testimony in determining not to order disclosure. Use of false testimony should constitute a due process violation whether the fact-finder is the jury at a trial or a judge deciding a Motion, *cf. Napue v. Illinois*, 360 U.S. 264 (1959). Additionally, neither the Motion Judge nor the Appellate Division was aware of the gun charge against Miami Eddie, further calling into question the Appellate Division's pre-trial "tipster" characterization of Miami Eddie. It is submitted that had that information been disclosed in a timely manner to the Motion Judge and the Appellate Division, a different result as to disclosure would have been reasonably probable, *Kyles v. Whitley*, 115 S. Ct. at 1566 (1995). However, the reasonable probability of a different result necessitated by *Kyles, id.*, does not require assessment with respect to the outcome of the trial but rather assessment as to the outcome of the motion seeking disclosure of the informer's identity. Given the reliance by the trial court and the appellate court on the misrepresented facts as well as the prosecutorial failure to advise of Miami Eddie's involvement as an informer for the DEA as well as his pending unlawful weapon indictment in Salem County, the prosecutorial misconduct here resulted in a per se *Brady* violation.

This Court has previously categorized informants as being "active participant", "eyewitness helpful to the defense" or "mere tipster", *United States v. Jiles*, 658 F.2d 194 (3d Cir. 1981), *cert. denied*, 455 U.S. 923 (1982). Given the information finally disclosed by the government just before and during trial, Miami Eddie was, at the least, an eyewitness helpful to the defense if not an active participant as to the transfer of cocaine from Daryl Shorter to "brother-in-law" Investigator Spinelli. Finally, Miami Eddie also obtained a special status as "eye witness helpful to the defense" in that he was the only non-law enforcement witness, along with Petitioner in Miami Eddie's vehicle at the time of his arrest, *cf. United States v. Jiles, supra.*

In light of this informant's role in the offense, as well as the fact that entrapment was properly raised, it is evident that the discovery requested by the petitioner was relevant, material, and favorable. *See Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 1050 (1972); *United States v. Beckett*, 889 F. Supp. 152 (D. Del. 1995) (allowing discovery of various matters concerning the informant). Petitioner was entitled to the disclosure of the informant's identity and the other related discovery he requested.

At the least, he was entitled to an *in camera* hearing on this issue. Many courts hold that the informant disclosure dilemma is best resolved by an *in camera* hearing, *United States v. Jackson*, 384 F.2d 825 (3d Cir. 1967), *cert. denied*, 392 U.S. 932 (1968); *United States v. Cortese*, 614 F.2d 914 (3d Cir. 1980); *McLawhorn v. North Carolina*, 484 F.2d 1 (4th Cir. 1973); *United States v. Freund*, 525 F.2d 873 (5th Cir.), *cert. denied*, 426 U.S. 923 (1976); *United States v. Sharp*, 778 F.2d 1182 (6th Cir. 1985), *cert. denied*, 475 U.S. 1030 (1986); *United States v. Weir*, 575 F.2d 668 (8th Cir. 1978); *United States v. Spires*, 3 F.3d 1234 (9th Cir. 1993); *Gaines v. Hess*, 662 F.2d 1364 (10th Cir. 1981). As the Third Circuit explained in *United States v. Jackson*, 384 F.2d 825, 872 (3d Cir. 1967), *cert. denied*, 392 U.S. 932 (1968):

> The advantage of the procedure is that it enables the court to view with a keener perspective the factual circumstances upon which it must rule and attaches to the court's ruling a more abiding sense of fairness than could otherwise have been realized.

384 F.2d at 827.

As was further explained in *United States v. Spires*:

> From the defendant's standpoint, an *in camera* hearing may provide many of the same benefits as

> disclosure itself, particularly where defendant's counsel is allowed to participate under an order not to reveal any information disclosed in chambers. . . . However, unlike actual disclosure, an *in camera* hearing bears little risk of disclosing the identity of the informant and does not jeopardize the government's future use of that individual. Consequently, there is ordinarily no governmental interest to balance against the defendant's in deciding whether to hold an *in camera* hearing. The only question is whether a defendant has made the necessary showing.

United States v. Spires, 3 F.3d at 1238 (citation omitted; footnote omitted).

While an in camera hearing need not be held whenever there is a request for the identity of an informant, the courts have approved of such a hearing where the defendant makes a "minimal threshold showing" that disclosure would be relevant to at least one defense. *Id.*; *see United States v. Cortese*; *United States v. Jackson*. Indeed, it has been held that under such circumstances a hearing is required. *United States v. Spires*. The failure to do so is an abuse of discretion. *Id.*; *see Acavino v. Daiss*, 555 F. Supp. 380 (E.D. Pa. 1983), *aff'd without opinion*, 734 F.2d 3 (3d Cir. 1984) (in light of *United States v. Cortese* and *United States v. Jackson*, court ordered an in camera examination of the informant).

In this case, viewing the facts in the light most favorable to the Petitioner, he clearly has presented sufficient facts to require at least an in camera hearing. In addition to establishing that the State presented false testimony which was relied on by the state courts in ruling against disclosure, the Petitioner has shown that the informant had worked on at least four prior cases. The informant did so after he apparently reached a "deal" with the

State in which the State agreed to dismiss a weapons charge against the informant in exchange for his work as an informant.

Roviaro v. United States, 353 U.S. 53 (1957) recognizes that:

> Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.
>
> * * *
>
> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

Roviaro v. United States, 353 U.S. at 60-61.

As noted in one treatise, the "other relevant factors" category referenced in *Roviaro* is a residual category:

> The final *Roviaro* factor is a residual category: "other relevant factors." The one of these that has received the most attention from the courts and commentators is danger to the informer. It has been argued, correctly it would seem, that since danger to

> the informer is the justification for the privilege it should be a preliminary fact to be proved by the privilege claimant.

Wright and Graham, Federal Practice and Procedure: Evidence § 5713 at p. 453.

In that regard also, those commentators criticized what seems to be an implicit assumption favoring the government:

> It has been noted that the government usually wins contests over disclosure. This may be proper but it may also be because the courts sometime seem to weight the scales in favor of the government by balancing the policy of the privilege against the defendant's interest rather than seeing how both sides fare on the facts of the case; this results in the assumption that there is always a government interest in nondisclosure without any evidence of that in the case of the particular informer. The better reasoned cases hold that a generalized interest in non-disclosure is not enough, that the state must show some need for secrecy in the instant case or suffer disclosure of the informer's identity.

Wright and Graham, Federal Practice and Procedure: Evidence § 5713 at p. 440.

Indeed, the same commentators have noted that simply because an informant has been labeled a tipster, that label does nothing more than describe "how he (or the police) have chosen to use that knowledge [provided by the alleged tipster]." The descriptive label of tipster "is of little relevance in determining whether the informer can provide testimony that would be helpful to the defense", *Wright and Graham, Ibid.* at 442. This Court

reaffirmed that it was unwilling to impose an absolute rule requiring disclosure of an informer's identity as it "would conflict with a case-by-case approach upon which the *Roviaro* decision was based", *McCray v. Illinois*, 386 U.S. 300 at 311, n.11 (1967). It is submitted that the dearth of post-*Roviaro* decisions furnishing guidance as to proper balancing of factors is because of the lack of a judicially created record. In short, requiring as a minimal due process protection, creation of a record at an *in camera* hearing will result in a better informed judiciary with a resulting refinement of the *Roviaro* standard. In *McCray*, this Court's majority noted that the motion judge was "obviously satisfied that each [officer] was telling the truth", *McCray*, 386 U.S. at 313, while the four dissenting members noted the pheonomenon of misrepresentation by the arresting officers, *McCray*, 386 U.S. at 316, n.2. The trial and appellate state courts involved in this Petition (along with Petitioner) learned too late that the arresting officer was not telling the truth. Had an *in camera* hearing been required, that information would have been disclosed at the September 10, 1993 pre-trial motion rather than reluctantly revealed by the prosecution team on the day before and the day of trial, May 16/17, 1994.

CONCLUSION

This Petition presents two significant issues concerning the interplay between *Roviaro* and *Brady v. Maryland*: (1) the materiality of a prosecutor's *Brady* violation on a pre-trial motion seeking an informer's identity should result in a per se *Brady* violation requiring complete disclosure at an *in camera* hearing wherein a record is judicially created which can thereafter be intelligently reviewed on appeal, and (2) at least in the context of a prima facie entrapment defense having been proffered, due process demands that an *in camera* hearing be held so as to allow a trial court the ability to garner information so as to discharge its duty in deciding the disclosure dilemma posed by *Roviaro*.

Either issue implicates an *in camera* hearing with "the most popular" alternative method of adjudicating informer privilege issues being "an *in camera* hearing with defense counsel present but not the defendant", *Federal Practice and Procedure: Evidence*, Wright & Graham, § 5717 at p. 491.

Accordingly, Petitioner respectfully requests that his Petition for Writ of Certiorari be granted.

Respectfully submitted,

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(609) 453-1000

APPENDIX A — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED DECEMBER 18, 1997 AFFIRMING THE DISTRICT COURT'S AUGUST 28, 1996 ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-5632

RICHARD K. PASHUCK,

Appellant

v.

JOHN B. COOKSEY, Sheriff, County of Salem NJ;
THE ATTORNEY GENERAL OF THE
STATE OF NEW JERSEY

On Appeal from the United States District Court
for the Districrt of New Jersey
(D.C. Civil Action No. 96-cv-01799)

(District Judge: Honorable Jerome B. Simandle)

Argued on December 11, 1997

Before: GREENBERG, ROTH, and SEITZ, *Circuit Judges*

Appendix A

JUDGMENT ORDER

After consideration of all contentions raised by appellant,

IT IS ADJUDGED AND ORDERED that the judgment of the district court entered August 28, 1996, be and is hereby affirmed.

Costs to be taxed against appellant.

BY THE COURT,

s/ Jane R. Roth
Circuit Judge

Attest:

s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

Dated: DEC 18 1997

Certified as a true copy and issued in lieu
of a formal mandate on January 23, 1998

Teste: s/ P. Douglas Sisk
Clerk, United States Court of Appeals for the Third Circuit

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MAY 22, 1997 GRANTING CERTIFICATE OF APPEALABILITY

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

APS-226 May 22, 1997

C.A. NO. 96-5632

RICHARD K. PASHUCK

v.

JOHN B. COOKSEY, ET AL

(D.N.J. CIV. NO: 96-CV-01799)

Present: BECKER, ALITO and McKEE, *Circuit Judges.*

Submitted are:

1) Appellant's notice of appeal, which may be construed as a request for a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(1);

2) Appellant's memorandum of law in support thereof; and

3) Appellee's memorandum of law in opposition thereto in the above-captioned case.

Respectfully,

P. Douglas Sisk
Clerk

PDS/MEG/jm

Appendix B

ORDER

The request for a certificate of appealability pursuant to 28 U.S.C. § 2253 is granted. The appellant has established that the failure to disclose the identify of the confidential informant may have resulted in the substantial denial of his federal constitutional right to due process. *See DiBlasio v. Keane*, 932 F.2d 1038, 1041-43 (2d Cir. 1991); *United States v. Price*, 783 F.2d 1132, 1137-39 (4th Cir. 1986); *McLawhorn v. State of North Carolina*, 484 F.2d 1 (4th Cir. 1973).

BY THE COURT:
s/ Edward R. Becker
Circuit Judge

DATED: JUN 26 1997

cc: John P. Morris, Esq.
Gregory G. Waterston, Esq.

APPENDIX C — ORDER OF THE UNITED STATES COURT FOR THE DISTRICT OF NEW JERSEY DATED AUGUST 27, 1996 DENYING PETITIONER'S APPLICATION FOR WRIT OF HABEAS CORPUS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action
No. 96-1799 (JBS)

RICHARD K. PASHUCK,

Petitioner,

v.

JOHN B. COOKSEY, Sheriff,

Respondent.

ORDER

This matter having come before the court upon the application of petitioner, Richard K. Pashuck, for a writ of habeas corpus pursuant to 28 U.S.C. § 2254; and the court having considered the submissions of the parties; and for the reasons stated in the Opinion of today's date;

IT IS this 27th day of August, 1996 hereby

ORDERED that petitioner's application for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254 be, and hereby is **DENIED**; and it is

Appendix C

FURTHER ORDERED that no certificate of probable cause to appeal shall issue.

s/ Jerome B. Simandle
JEROME B. SIMANDLE
United States District Judge

APPENDIX D —OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED AUGUST 27, 1996

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action
No. 96-1799 (JBS)

RICHARD K. PASHUCK,

Petitioner,

v.

JOHN B. COOKSEY, Sheriff,

Respondent.

* * *

OPINION

SIMANDLE, District Judge:

Petitioner, Richard Pashuck, presently on parole, was previously confined at the Salem County Correctional Facility, in Salem, New Jersey, having been found guilty by a jury of distributing a controlled dangerous substance and resisting arrest without use of physical force or violence. While at Salem County, petitioner filed the instant petition requesting habeas corpus relief pursuant to 28 U.S.C. § 2254. Petitioner seeks

relief on the following three grounds: (1) petitioner claims that the failure of the State to disclose the true identity of its confidential informant violated his due process rights under the Fourteenth Amendment; (2) petitioner asserts that the State's failure to disclose the informant's indictment, the order dismissing the indictment, and the State's failure to disclose the reports of the informant's prior investigations for a state task force violated his due process rights under the Fourteenth Amendment; and (3) petitioner maintains that the admission into evidence of hearsay testimony violated his right to confront witnesses against him under the Sixth Amendment. For the reasons set forth below, the petition for habeas corpus relief will be denied.

I. Factual Background and Procedural History

On March 15, 1993, petitioner, Richard Pashuck, was present in a bar in the Woodstown Hotel when he was approached by a man who introduced himself as Miami Eddie Taylor (hereinafter "Miami Eddie"). (Respondent's Exhibit at 54) (Transcript of Suppression Hearing, dated September 30, 1993) (hereinafter "Resp. Ex."). The two men had some refreshments and played pool together. (*Id.*). Miami Eddie boasted that he was an expert pool player and showed petitioner some of his trick pool shots. (*Id.*). Miami Eddie also purchased drinks and cigarettes for petitioner. (*State v. Pashuck*, A-6359-93T1, at 3 (App. Div. Dec. 5, 1995)).

Later that afternoon, Miami Eddie expressed an interest in purchasing some cocaine. (Resp. Ex. at 54). He stated that he was driving to Florida and that he needed the cocaine to help him stay awake. (*Pashuck*, A-6359-93T1, at 3). Petitioner stated that he refused Miami Eddie's overture four times before

agreeing to secure the drugs. (*Id.*). Petitioner then approached another patron of the bar, Daryl Shorter, who indicated that he had two packets of cocaine which he would sell for ninety dollars. (*Id.*). Petitioner relayed this information to Miami Eddie who then said that he needed to check with his brother-in-law. (*Id.*).

Instead, Miami Eddie, acting as a confidential informant, telephoned the Salem County Narcotics Task Force and indicated that petitioner had agreed to sell him cocaine. (*Id.*). Sergeant Miller, then Lieutenant Miller, handled the investigation of the drug sale and arranged to send an investigator in an undercover capacity to conduct a hand-to-hand purchase from petitioner. (*Id.* at 4).

Miami Eddie had previously performed undercover operations for the task force as well as the federal Drug Enforcement Agency. (*Id.* at 3). He had also been previously charged with a gun violation and agreed to work as an informant for the task force in exchange for consideration on the gun charge. (Petitioner's Brief at 4). However, on the evening of March 15, 1993, Miami Eddie was not employed by the task force. (Resp. Ex. at 58).

Prior to the drug transaction, a unit of investigators met with Miami Eddie outside of the Woodstown Hotel. (Resp. Ex. at 25). Investigator Edward Spinelli stated that he would pose as Miami Eddie's brother-in-law and that he would station himself inside Miami Eddie's vehicle in order to carry out the transaction. (*Id.* at 26).

Miami Eddie then returned to the hotel and re-emerged accompanied by petitioner. (*Id.* at 27). The two approached the

vehicle, which was parked in the hotel's rear parking lot, where Investigator Spinelli was stationed. (*Id.*). Miami Eddie entered into the passenger seat of the vehicle, petitioner entered into the back seat, and Investigator Spinelli was seated in the driver's seat. (*Id.*). Miami Eddie introduced Investigator Spinelli to petitioner as his brother-in-law. (*Id.* at 28). Investigator Spinelli stated that he was interested in purchasing some cocaine for the ride back to Florida. (*Id.*). Petitioner indicated that he had two fifty dollar bags of cocaine which he would sell for ninety dollars and handed the bags to Investigator Spinelli. (*Id.*). Investigator Spinelli examined the bags and handed petitioner ninety dollars in United States currency. (*Id.*). Then, Investigator Spinelli turned off the car's headlights to signal the other unit officers and petitioner was subsequently arrested. (*Id.* at 40-41).

On June 22, 1994, petitioner appeared in the Superior Court of New Jersey, Salem County, Law Division and was convicted by a jury of distributing a controlled dangerous substance and resisting arrest without use of physical force. (Petition for Habeas Corpus at 2) (hereinafter "Hab. Pet."). Petitioner was sentenced to sixty days in the Salem County Correctional Facility commencing March 4, 1996. (*Id.*). The court also sentenced petitioner to two years probation, fined him $500, and assessed petitioner a $1,000 D.E.D.R. penalty, a $50 lab fee, and a $100 V.C.C.B. penalty. (*Pashuck*, A-6359-93T1, at 2). Petitioner driver's license was also suspended for a year. (*Id.*).

Petitioner appealed his conviction to the Superior Court of New Jersey, Appellate Division. (Hab Pet. at 3). However, on December 5, 1995, the Appellate Division, via an unpublished opinion, affirmed petitioner's conviction. (*Id.*). On December 22, 1995, petitioner filed for Certification to the New Jersey Supreme Court and on February 26, 1996, the Court denied that request. (*Id.*).

Appendix D

On April 12, 1996, petitioner filed the instant petition for habeas corpus relief and we now turn to the merits of petitioner's application.[1]

II. Discussion

A. Petitioner's Claim that the State's Failure to Disclose the True Identity of its Confidential Informant Violated His Due Process Rights Under the Fourteenth Amendment

Petitioner's first argues that the State's nondisclosure of the identity of its confidential informant violated his due process rights under the Fourteenth Amendment. In *Roviaro v. United States*, 353 U.S. 53 (1957), the Supreme Court set forth the

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1. Generally, a habeas corpus petitioner must be "in custody" pursuant to the conviction or sentence under attack at the time his petition is filed. See *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968). If a petitioner is unconditionally released before his habeas petition is disposed of, however, he is no longer considered "in custody" and, therefore, a federal court no longer retains jurisdiction over the petition, with an exception if the petitioner will suffer collateral legal consequences due to his conviction. *Id.* at 237. The "in custody" requirement, however, does not mean that the petitioner must be physically confined for the federal court to retain jurisdiction. The term "in custody" has been liberally construed so as to mean "restraints on a man's liberty, restraints not shared by the public generally." *Jones v. Cunningham*, 371 U.S. 236, 240 (1963). Under this standard, a prisoner released on parole remains "in custody" for purposes of habeas corpus petitions brought under 28 U.S.C. §§ 2241, 2254, and 2255. *Id.* at 243; *Barry v. Brower*, 864 F.2d 294, 296 (3d Cir. 1988). Therefore, this court retains jurisdiction over this matter, despite petitioner's release from the Salem County Correctional Facility during the pendency of this application, because petitioner is serving his two-year term of probation.

standards for determining when a request for disclosure of a government informant's identity should be granted.[2] The Court held that "[w]here the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense, or is essential to a fair determination of cause, the [government's] privilege [to withhold disclosure of the informer's identity] must give way." *Id.* at 60-61. The Court, however, announced no fixed rule for determining when disclosure is justifiable. Rather, the Court left substantial leeway

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2. In *Roviaro*, the Supreme Court held that "fundamental requirements of fairness" dictate disclosure of an informant's identity in certain circumstances. 353 U.S. at 60-61. However, the Court did not explicitly state that such disclosure is required by a specific provision of the Constitution. Thus, this raises the issue as to whether this case is properly before this court, as only constitutional error is cognizable upon an application for habeas relief. This question was also present and decided in *Pena v. LeFerve*, 419 F. Supp. 112, 115 (E.D.N.Y. 1976). The Court in *Pena* reasoned that if disclosure of the informant's identity as discussed in *Roviaro* is solely a matter of enforcement of evidentiary rules for federal criminal trials, then an erroneous ruling of a State trial judge is at best an error of State evidentiary law. *Id.* Therefore, such an error would not constitute a constitutional ground upon which petitioner may apply for federal habeas corpus relief. If the disclosure of an informant's identity is governed by the constitution, however, then failure to disclose an informant under *Roviaro* standards would entitle a petitioner to federal habeas corpus relief. *Id.* We concur with the court's conclusion in *Pena* that *Roviaro* did view the disclosure of an informant's identity as encompassing issues of constitutional magnitude. *Id.* at 115-117. Accordingly, we will proceed to adjudicate petitioner's argument as cognizable in a federal habeas corpus proceeding. See *also Gaines v. Hess*, 662 F.2d 1364, 1368 (10th Cir. 1981) (adopting the *Pena* court's interpretation of *Roviaro*.

to trial courts to determine on a case-by-case basis whether disclosure is warranted, instructing courts to balance "the public interest in protecting the flow of information against the individual's right to prepare his defense." *Id.* at 62. *See also United States v. Brown*, 3 F.3d 673, 679 (3d Cir.), *cert. denied*, 510 U.S. 1017 (1993) (citing *Roviaro*, 353 U.S. at 62).

In reviewing a trial court's disclosure decision, however, the Third Circuit has stated that "[w]hether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Brown*, 3 F.3d at 679 (citing *Roviaro*, 353 U.S. at 62). Moreover, a district court may only grant habeas relief if it finds that: (1) a constitutional error occurred at the state court trial and (2) that such an error "had substantial and injurious effect or influence in determining the jury's verdict." *Jackson v. Calderon*, Civ. No. 94-2305, 1994 WL 661061, at *5 (N.D. Cal. Nov. 14, 1993) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). In other words, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in "actual prejudice". *See id.* at *5 (citing *Brecht*, 507 U.S. at 637). In the instant case, the trial court did not err by denying petitioner's motion for disclosure.

In support of his argument, petitioner relies on *Roviaro*; this reliance, however, is misplaced. In *Roviaro*, 353 U.S. at 62-65, the Supreme Court concluded that the district court erred in permitting the government to withhold the identity of its undercover agent because as there was some doubt as to whether the accused actually possessed narcotics and whether the accused

actually knew that he possessed narcotics. Because the informant was the only person in a position to amplify or contradict the testimony of government witnesses, the Court found disclosure to be required. *Id.*

In the instant case, however, Miami Eddie's possible testimony would have little relevance to petitioner's defense. First, petitioner does not even deny the fact that he possessed and sold cocaine to an undercover police officer, as he admitted possession and sale in his testimony before the jury. (*Pashuck*, A-6359-93T1, at 2, 5). Hence, unlike *Roviaro*, there remains no issue as to whether petitioner has satisfied all of the elements of the crime. Also, unlike *Roviaro*, an undercover police officer was present, along with Miami Eddie, during the entire drug transaction. Moreover, petitioner filed Affidavits of three witnesses at trial to corroborate his version of the events of that day. (Resp. Ex. at 67) (*State v. Pashuck*, A-862-93T5F, at 4 (App. Div. Mar. 22, 1994) (Opinion and Order granting stay and leave to appeal denial of disclosure)). Thus, despite the fact that Miami Eddie played an active role in bringing about the drug transaction, the abundance of witnesses reduces the potential value of his testimony. Moreover, considering that petitioner has already admitted that he was involved in the drug transaction, Miami Eddie's testimony would be neither relevant nor helpful to petitioner's defense in this case. As such, this court can not find that petitioner was prejudiced by the nondisclosure of the informant's identity.

Petitioner also maintains that he is entitled to disclosure of the informant's identity because the informant's testimony may be relevant to the affirmative defense of entrapment. This contention is meritless. The mere allegation of entrapment, alone, is not sufficient to justify the disclosure of an informant's

identity. *See United States v. Kerris*, 748 F.2d 610, 614 (11th Cir. 1984). A defendant must first present some evidence before the defense is properly raised, and until then, a court need not order the government to disclose the identity of the informant. *Id.* In addition, a valid defense of entrapment has two related elements: (1) government inducement of the crime; and (2) a lack of predisposition on the part of the defendant to engage in the criminal conduct. *See United States v. Robles*, 814 F. Supp. 1233, 1241 n.8 (E.D.Pa. 1993) (citing *Mathews v. United States*, 485 U.S. 58 (1988)). Predisposition, the principal element in the defense of entrapment, focuses upon whether the defendant was an "unwary innocent" or, instead, an "unwary criminal" who readily availed himself of the opportunity to perpetrate the crime. *Id.*

In the instant case, the record supports the conclusion that petitioner was predisposed to sell drugs. Despite the fact that Miami Eddie solicited petitioner four times for cocaine, petitioner, upon agreeing to do business with Miami Eddie, was readily able to secure the drugs. There was no unusual inducement from "Miami Eddie" to persuade Mr. Pashuck to commit the crime, simply an agreement to transact two bags of cocaine for a price of $90.00, which has not been argued to be in any way excessive, let alone irresistible. Likewise, there was no inducement of future business, since "Miami Eddie" said he was going back to Florida. The fact that petitioner knew that he could obtain narcotics from Daryl Shorter, and did, does not reveal the mindset of a person who was undisposed to committing the crime. Furthermore, petitioner's contention that but for Miami Eddie demonstrating a few trick pool shoots, buying him drinks, and cultivating a friendship he would not have been lured into committing the crime is unpersuasive. Moreover, all this evidence was before the jury and defendant's

explanations were uncontradicted, and the jury was free to weigh it whether or not Miami Eddie testified. Hence, petitioner has failed to properly present an entrapment defense, and therefore, the trial court did not commit prejudicial error by refusing to disclose the true identity of the confidential informant on these grounds.

Lastly, petitioner contends that the State deliberately deceived the court of material evidence useful to petitioner's defense, thereby depriving him of his due process rights. At the pretrial hearing on September 10, 1993, Investigator Spinelli testified that, to his knowledge, Miami Eddie had no prior involvement with the Task Force nor any other law enforcement agency. Yet, at a hearing on March 16, 1994, Sergeant Miller, testified that Miami Eddie had been working under an arrangement with the Task Force since December, 1992. Petitioner alleges that the State knew of this discrepancy throughout the pretrial and trial proceedings and failed to correct it. Thus, petitioner asserts that this failure to reconcile the testimony of the investigators was material to the disclosure issue and tantamount to a deliberate deception of the court.

In support of this argument, petitioner relies on the Supreme Court's decision in *Giglio v. United States*, 405 U.S. 150 (1972). Therein, the Court, in finding a due process violation and remanding the case for a new trial stated that "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with the 'rudimentary demands of justice.' " *Id.* at 153. The Court has also held that the same result occurs when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. *Id. See also Napue v. Illinois*, 360 U.S. 264, 269 (1959).

Petitioner's reliance on *Giglio*, however, is misplaced. The Court in *Giglio* also stated that false evidence must be material to the defense of the accused before a due process violation can be found. *See* 405 U.S. at 154 (citing *Brady v. Maryland*, 373 U.S. 83 (1963)). Here, the discrepancy between the testimony of the investigators has no relevance to petitioner's defense.

First, petitioner has already admitted to possessing drugs and selling those drugs to an undercover police officer. Hence, he has presented no defense to the elements of the crime charged. In addition, this court has already determined that petitioner has not properly raised an affirmative defense of entrapment. Although this discrepancy in testimony may be material to issue of Miami Eddie's involvement with the Task Force, and thus the government inducement prong of the entrapment defense, petitioner's predisposition to commit the crime destroys the defense in this case. Thus, the lack of materiality of the discrepancy of the investigators' testimony compels this court to find that petitioner's due process rights have not been violated and no prejudicial error has occurred.

Moreover, this court cannot find that the prosecution's failure to reconcile the discrepancy of the investigators' testimony constitutes deliberate deception. At the time of the arrest, Investigator Spinelli had only been working for the Salem County Prosecutor's Office for one week. At the September 10th hearing, Investigator Spinelli testified that he had never met with Miami Eddie prior to petitioner's arrest and that, to his knowledge, Miami Eddie had performed no previous work for the Task Force nor any other drug enforcement agency. Given the short period of time that Investigator Spinelli had been with the task force, it is reasonable to believe that he would

not be aware of Miami Eddie's previous involvement with the Task Force to the same degree as Sergeant Miller, who testified at trial that he was directly responsible for Miami Eddie. Investigator Spinelli was only testifying to the best of his knowledge.

Although his testimony was inaccurate, there is no evidence in the record to show that it was untruthful. In any event, Sergeant Miller corrected the testimony at the hearing on March 16, 1994, revealing Miami Eddie's status as an occasional task force informant since December, 1992. This correction occurred three months before trial, and defendant could bring this discrepancy to the jury's attention. Although Spinelli's earlier testimony was inaccurate, the court is not left with the impression that there is a colorable argument that the prosecution team attempted to deceive the court. Accordingly, petitioner's due process argument must fail.

B. Petitioner's Claim that the State's Failure to Disclose the Indictment, the Order Dismissing the Indictment, and the Reports of the Informant's Prior Investigations Violated His Right to Due Process Under the Fourteenth Amendment

Petitioner next argues that the State's failure to disclose the informant's indictment, the order dismissing the indictment, and the reports of the informant's prior investigations with the Task Force violated his right to due process under the Fourteenth Amendment. Petitioner claims that these documents are relevant to determining whether Miami Eddie was still working for the Task Force on the day of the arrest.

In *Brady v. Maryland*, 373 U.S. at 83, the Supreme Court announced the due process standard applicable to the disclosure

of information that may tend to exculpate the accused. In that case, the Court concluded that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 86. On the basis of this standard, this court concludes that petitioner's claim lacks merit.

First, despite reliance upon *Brady*, petitioner does not submit in what way Miami Eddie's involvement with the Task Force is material to petitioner's guilt or punishment in this case. The only issue to which Miami Eddie's involvement may have some relevance is the government inducement prong of the entrapment defense. Because of petitioner's predisposition to commit the crime, however, this court has already determined that petitioner's entrapment defense is unsupportable. Hence, even if these documents did reveal that Miami Eddie was working for the Task Force, such information is not favorable to petitioner in this case. Moreover, there has been no showing that these documents, which were all completed before petitioner's arrest, would contain information concerning Miami Eddie's involvement with the Task Force on the day of the arrest. Because of the lack of materiality and lack of favorable value of this evidence, this court finds that the trial court did not err in denying petitioner access to these documents and that petitioner's due process rights were not violated.

C. Petitioner's Claim that the Admission into Evidence of Hearsay Testimony from the Informant Who Was Not Produced at Trial Violated His Right to Confront Witnesses Against Him Under the Sixth Amendment

Lastly, petitioner claims that the trial judge permitted into evidence hearsay testimony of the confidential informant in

violation of petitioner's right to confront witnesses against him under the Sixth Amendment.[3] Petitioner challenges Sergeant Miller's trial testimony wherein he stated that he was alerted by the confidential informant that an individual was selling cocaine at the Woodstown Hotel Bar. On appeal, petitioner argued that this testimony created the inescapable inference that petitioner initiated the sale of drugs, thereby destroying his entrapment defense. However, petitioner's claims are without merit.

In *State v. Bankston*, 63 N.J. 263, 268 (1973), the New Jersey Supreme Court stated that "[i]t is well-settled that the hearsay rule is not violated when a police officer explains the reason he approached a suspect or went to the scene of the crime by stating that he did so upon information received." The Court in *Bankston* also devised a test for determining when such testimony violates the hearsay rule:

> [W]e are not concerned with mere possible inferences. When the logical implication to be drawn from the testimony leads the jury to believe that a non-testifying witness has given the police evidence of the accused's guilt, the testimony should be disallowed as hearsay.

Id. at 271. In the instant case, this court can not find that the hearsay rule has been violated.

First, Sergeant Miller's testimony could not lead to the logical implication that petitioner initiated the drug transaction.

---

3. New Jersey Evidence Rule 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted." N.J. R. Evid. 801(c).

Appendix D

The record already reflects that Miami Eddie initiated the contact with petitioner and that he repeatedly expressed an interest in purchasing cocaine. In addition, the statements of the informant fail to reveal any evidence relevant to petitioner's predisposition to commit the crime. Rather, the fact that petitioner readily secured drugs from another patron of the bar demonstrates his predisposition to selling cocaine and undermines his claims of entrapment. As such, this court can not find that Sergeant Miller's testimony provided evidence detrimental to petitioner's entrapment defense.

Moreover, Sergeant Miller's testimony was not offered to discredit petitioner's claims of entrapment. The rule prohibiting hearsay is not violated where the hearsay statement is not offered to prove the truth of the matter asserted. *See State v. Johnson*, 216 N.J. Super. 588, 600 (App. Div. 1987). Instead, the informant's statement was used to explain the reasons why Sergeant Miller dispatched investigators to the Woodstown Hotel, not that petitioner was in fact selling drugs. Further, petitioner's own trial testimony admitted knowingly possessing and selling the cocaine. Because this court can not discern how the informant's statements prejudiced petitioner's entrapment defense, we can not disturb the appellate court's ruling that because Sergeant Miller testimony helped to explain the reason he sent investigators to the scene, the hearsay rule was not violated in this case. Thus, the trial court did not commit prejudicial error in determining that Sergeant Miller's testimony was admissible and petitioner's Sixth Amendment claims must fail.

Appendix D

III. Conclusion

For the reasons set forth above, petitioner's application for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, is hereby denied. The accompanying Order is entered.

s/ Jerome B. Simandle
JEROME B. SIMANDLE
United States District Judge

APPENDIX E — ORDER OF THE SUPREME COURT OF NEW JERSEY FILED FEBRUARY 26, 1996 DENYING PETITION FOR CERTIFICATION

SUPREME COURT OF NEW JERSEY
C-694 September Term 1995
41,487

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RICHARD K. PASHUK,

Defendant-Petitioner.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-6359-93 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 26th day of February, 1996.

s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

APPENDIX F — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DECIDED DECEMBER 5, 1995

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-6359-93T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RICHARD K. PASHUCK,

Defendant-Appellant.

Argued October 12, 1995 — Decided DEC 05 1995

Before Judges King, Landau and Humphreys.

On appeal from the Superior Court of New Jersey, Law Division, Salem County.

* * *

PER CURIAM

The defendant was convicted by a jury of possessing and distributing cocaine, third degree offenses, contrary to *N.J.S.A.* 2C:35-10(a)(1) and *N.J.S.A.* 2C:35-5(a)(1). In addition, the jury

found the defendant guilty of resisting arrest, a fourth degree offense which was downgraded by the jury verdict to a disorderly person's offense. The jury also found that the defendant was not entrapped, *see N.J.S.A.* 2C:2-12, into possessing and distributing the cocaine. The judge merged the possession conviction into the distribution conviction and sentenced the defendant to two years probation with sixty days in the county jail. A $500 fine, $1,000 DEDR penalty, $50 lab fee, and $100 VCCB penalty were imposed. The defendant's driver's license was suspended for a year.

Defendant appeals his conviction. He does not deny that he possessed cocaine and sold it to an undercover police officer. He asserts, however, that various rulings of the trial court prejudiced his entrapment defense and therefore deprived him of a fair trial. Specifically defendant alleges: (1) he was prejudiced by the admission into evidence of a statement of "Miami Eddie", a police confidential informant; (2) the judge should have molded the charge on entrapment to the facts of the case; (3) the judge should not have changed the charge in the State's favor when the judge re-charged the jury during the jury's deliberations; and (4) the judge should not have denied the defense's request for discovery of certain reports and other information as to the prior activities of the State's confidential informant.

After a thorough review of the record, and consideration of the briefs and arguments of counsel, we find that the defendant's arguments are without merit and, except as follows, do not warrant discussion in a written opinion. *See R.* 2:11-3(e)(2).

The defendant testified that he was accosted in a hotel bar by a person calling himself "Miami Eddie" and asked to obtain

some cocaine. Miami Eddie said he wanted the cocaine because he was driving to Florida and needed the cocaine to help him stay awake. Defendant said he refused Miami Eddie's overture four times. Finally, the defendant agreed and approached a person at the bar who reportedly could provide cocaine. The person indicated he had two packets of cocaine which he would sell for $90. Defendant relayed this information to Miami Eddie who said he had to check with his brother-in-law.

Miami Eddie was a confidential informant for the Federal Drug Enforcement Agency ("DEA"). He had been involved in prior undercover operations for the Agency and also for the Salem County Narcotics Task Force. Miami Eddie called the Task Force and arrangements were made for him to buy the cocaine from the defendant. The defendant obtained the cocaine from the person at the bar and sold the cocaine for $90 to an undercover police officer posing as Miami Eddie's brother-in-law. The defendant was then arrested.

The defendant contends that he was not predisposed to commit the offense and that Miami Eddie unduly influenced him. Defendant alleges that Miami Eddie gained the defendant's confidence by showing defendant some trick pool shots and buying him drinks and cigarettes and that this conduct overbore the defendant's will.

Lieutenant Miller was the officer that planned the investigation of the drug sale. In his testimony at trial, he was asked what he had decided to do after he had discussed certain matters with Miami Eddie. Lieutenant Miller responded that he intended to send an investigator to work in an undercover capacity "to make a hand-to-hand purchase off of an individual who was supposedly selling cocaine." Defense counsel objected, asked that the statement be stricken and also asked for a mistrial.

The judge denied the applications. The judge said that he thought the statement was not hearsay or prejudicial. However, the trial judge also said he would consider giving the jury a cautionary instruction but defendant's counsel declined on the ground that it would highlight the testimony.

Later on re-direct, Lt. Miller testified that Miami Eddie had "mentioned the fact that he had an individual who was selling cocaine at the bar." Defendant's counsel again objected. The court sustained the objection but denied defense counsel's renewed motion for a mistrial.

Defendant contends on appeal that the State elicited the testimony in order to refute the defendant's entrapment defense without calling the confidential informant as a witness.

Defendant argues:

> [the jury was left with the] inescapable inference that the defendant had initiated the sale of the cocaine to the confidential informant . . . because the defendant was the only one being investigated and the statements were allegedly made to the investigator shortly after 'Miami Eddie' entered the . . . bar. In fact, the question which elicited the second hearsay statement specifically referred to the defendant by name as the individual who was selling cocaine at the bar.

The hearsay rule is not violated when a police officer "explains the reason he approached a suspect or went to the scene of the crime by stating that he did so 'upon information received. . . .' " *State v. Bankston*, 63 *N.J.* 263, 268 (1973) (citation omitted). Such testimony is "admissible to show that

the officer was not acting in an arbitrary manner or to explain his subsequent conduct." *Ibid.* "However, when the officer becomes more specific by repeating what some other person told him concerning a crime by the accused the testimony violates the hearsay rule. . . . Moreover, the admission of such testimony violates the accused's Sixth Amendment right to be confronted by witnesses against him." *Id.* at 268-69 (citations omitted).

Lieutenant Miller's testimony did not violate the *Bankston* rule. The officer did not specifically identify the accused as the person committing a crime. Further, the defendant did not deny that he was committing a crime. The defendant admitted in his testimony that he had agreed to obtain the cocaine for Miami Eddie at a cost of $90.

We are also satisfied that the testimony was not clearly capable of producing an unjust result. *See R.* 2:10-2. The defendant was able, through his testimony, to present his version of the events. The State did not offer Miami Eddie as a witness. Thus, the defendant's version was uncontradicted. Under these circumstances, the statement attributed to Miami Eddie by Lieutenant Miller was not likely to be given much weight by the jury. In addition the judge sustained the objection to Lieutenant Miller's answer on his redirect testimony. Moreover, the trial judge indicated that he would consider giving a curative instruction if the defendant wished one. The judge's rulings on this and the other issues raised by the defendant were reasonable exercises of his discretion and not clearly capable of producing an unjust result. *See R.* 2:10-2; *Dintner v. Sears, Roebuck & Co.*, 252 *N.J. Super.* 84, 92 (App. Div. 1991). The judge's charge was clear, balanced and accurate as was the recharge. The defendant received sufficient information in discovery to

enable him to present his entrapment defense. The jury, on the facts here, could easily find that the defendant had not been entrapped.

The defendant was fairly tried and convicted of the crime which he admittedly committed. The conviction is affirmed.

APPENDIX G — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION FILED MARCH 22, 1994

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-862-93T5F

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RICHARD K. PASHUCK,

Defendant-Appellant.

Argued: February 10, 1994 — Decided: MAR 22 1994

Before Judges King, Havey and A. M. Stein.

On appeal from the Superior Court of New Jersey, Law Division, Salem County.

* * *

PER CURIAM

We stayed the trial in this narcotics prosecution and granted defendant's motion for leave to appeal in order to examine Judge Farrell's ruling of September 30, 1993, denying disclosure of the identity of the State's confidential informant [CI] in this

case who is known to the litigants as "Miami Eddie." During the course of our consideration of this appeal, the Supreme Court decided *State v. Florez*, __ *N.J.* __ (1994) (slip op., January 27, 1994). Upon review of this record and the principles reiterated by the Supreme Court in *Florez,* we are satisfied that Judge Farrell's ruling was consistent with the sound exercise of discretion in the circumstances. We affirm.

On September 10, 1993, the judge conducted an evidentiary hearing pursuant to *N.J.R.E.* 104 (*Evid. R.* 8) on defendant's motion to compel disclosure of the identity of the CI. The State also had moved for a protective order to prevent disclosure of the informant. The judge denied the motion on September 30. At the hearing, the judge heard the testimony of Investigator Spinelli of the Salem County Prosecutor's Office and considered defendant's written submissions concerning the events which occurred in and about the Woodstown Hotel Bar on March 15, 1993.

The defendant claimed that "Miami Eddie" lured him into a narcotics transaction on that day through his friendliness and facility at the pool table over a late afternoon of drinking and companionship. The State does not intend to use the CI as a witness at trial. When the drug transaction occurred outside the bar in the CI's automobile, the CI, Investigator Spinelli, and the defendant were all present. Defendant had obtained the $90's worth of cocaine he was allegedly gulled into selling to the undercover Spinelli from Daryl Shorter, another patron of the Woodstown Hotel Bar that afternoon. Shorter was known to defendant as a possible source of narcotics. Defendant was a "regular at the bar", he says.

The County Prosecutor alleges and Spinelli testified that defendant was not targeted for criminal investigation in any

sense that day. Defendant claims he is a decent, law-abiding citizen despite "several disorderly offenses and traffic violations on my record." He claims that he was unreasonably targeted and entrapped by the State and that relevation of "Miami Eddie's" true identity is essential to the fair presentation of his defense, even though the State is not going to use him at trial. We disagree.

While the CI participated in the transaction, his participation here was not such as to compel disclosure. Defendant also participated directly in every phase of the transaction. He himself obtained the drugs from his own acquaintance, Shorter, and was present in the car when the drugs were handed over to either Spinelli or "Miami Eddie" in the presence of defendant and Spinelli, depending on the version believed.

Spinelli said that "Miami Eddie" was not a paid informant and had never been employed, to his knowledge, in an informer capacity by his office. Spinelli testified that he received a "tip" emanating from a telephone call from the bar, presumably from the CI to the Prosecutor's office, and responded appropriately to make the undercover purchase. The judge accepted Spinelli's testimony as truthful.

The judge concluded that the "hardship allegation is [not] plausible to the extent that the name of the informant should be disclosed." Although the judge thought that the claim of entrapment was weak, he was not prepared to rule on its efficacy as a matter of law. The outcome on that issue depended on the proofs presented at trial, the judge properly concluded.

The appropriate standard for reviewing the denial of a motion for disclosure is whether the judge "abused [his]

discretion after weighing the competing considerations of the balancing test." *State v. Milligan*, 71 *N.J.* 373, 384 (1976); *Roviaro v. United States*, 353 *U.S.* 53, 61 n.9, 77 *S. Ct.* 623, 1 *L. Ed.* 2d 639 (1956). We find no reason to conclude that disclosure of "Miami Eddie's" identity "is essential to assure a fair determination of the issues" in this case. *N.J.E.R.* 516(b) (*Evid. R.* 36); *N.J.S.A.* 2A:84A-28. Defendant has filed affidavits from his witnesses, James Crawford, Arthur Mintner, and Michael West, in addition to defendant's own seven-page certification. The defendant's witnesses stood ready to corroborate his version of the events of the afternoon of March 15, 1993. And, no doubt defense counsel will make effective use of the State's refusal to produce "Miami Eddie" to contradict the defense's version of the events. The CI is certainly not essential to the presentation of defendant's entrapment defense in this scenario.

Informers serve an indispensable role in police work. Their continued cooperation with police is encouraged. *State v. Milligan, supra.* The "informers privilege" is an important law enforcement tool. The "informer's privilege" is "the government's privilege to withhold from disclosure the identity of persons who furnished information of violations of law to officers charged with enforcement of that law." *Roviaro v. United States, supra,* 353 *U.S.* at 59, 77 *S. Ct.* at 627, 1 *L. Ed.* 2d at 644.

The privilege is not absolute. The privilege is limited where the informant's identity is helpful to the accused's defense, essential to a fair determination of the issues, or where the entrapment defense is reasonably plausible. *Roviaro, supra,* 353 *U.S.* at 60-61, 64, 77 *S. Ct.* at 626, 629, 1 *L. Ed.* 2d at 645, 647. Disclosure of an informant's identity is also warranted

where the informant is an active participant in the crime. *State v. Milligan, supra,* 71 *N.J.* at 385-87. If, for example, the CI merely provides the police with a "tip," disclosure will not be compelled. *Id.* at 387-90. Nor will disclosure be compelled where the CI merely introduces the defendant to the police, even where the CI then becomes the only witness, besides defendant, who can controvert the police officer's testimony. *Ibid.*

Whether the State should be compelled to order disclosure depends on the particular circumstances of each case. *Roviaro, supra,* 353 *U.S.* at 62, 77 *S. Ct.* at 628, 1 *L. Ed.* 2d at 646. The public interest in protecting the flow of information must be balanced against the individual's right to prepare his defense.

In *Milligan,* the informant introduced an undercover police officer to defendant. 71 *N.J.* at 378. Though the informant was present and participated in the discussion concerning drugs, the informant did not negotiate the sale. *Ibid.* Nor was he present when the drug transaction occurred. *Id.* at 379. Calling this a "close case," the Court concluded that the "informer's limited involvement in the crime, the speculative significance of his testimony and the reasons offered for disclosure [did] not significantly outweigh the State's interest in protecting the free flow of information." *Id.* at 394.

Judge Baime recently summarized the relevant considerations applicable here in this way:

> The most the defendant can say here is that he hopes the informer, if called by him, would corroborate his version and destroy the State's case. If that unsupported hope suffices, it is plain that an informer

"could no longer serve as a cover or decoy." *State v. Oliver,* 50 *N.J.* at 46, 231 *A.*2d 805. "If a defendant may insist upon disclosure of the informant in order to test the truth of the officer's statement that there is an informant or as to what the informant related or as to the informant's reliability, we can be sure that every defendant will demand disclosure." *State v. Burnett,* 42 *N.J.* at 385, 201 *A.*2d 39. After all, the defendant has nothing to lose and the prize may be the dismissal of the charges if the State cannot afford to reveal its source, as is so often the case. Since there is no way to test the good faith of a defendant who presses the demand, "we must assume the routine demand would have to be routinely granted." *Ibid.* We must be mindful of the ease with which the privilege would be destroyed and the supply of relevant information diminished if disclosure were the norm. Not much would remain of the informer's privilege and its underlying social benefit. The exception would exhaust the whole. Instead, we accept the premise that the informer "is a vital part of society's defensive arsenal" and, whatever his motive, requires protraction against retaliation. *Ibid.*

[*State v. Salley,* 264 *N.J. Super.* 91, 101 (App. Div. 1993).]

We affirm.

APPENDIX H — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JANUARY 15, 1998 DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 96-5632

RICHARD K. PASHUCK,

Appellant.

v.

JOHN B. COOKSEY, Sheriff, County of Salem NJ;
THE ATTORNEY GENERAL OF THE
STATE OF NEW JERSEY

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 96-cv-01799)
(District Judge: Honorable Jerome B. Simandle)

Before: GREENBERG, ROTH, and SEITZ, *Circuit Judges*

ORDER

The petition for panel rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

By the Court,
s/ Jane R. Roth
Circuit Judge

Dated: JAN 15 1998